

Appointment

From: Weiss, Kevin [Weiss.Kevin@epa.gov]
Sent: 8/27/2013 2:01:20 PM
To: Weiss, Kevin [Weiss.Kevin@epa.gov]; Morrissey, Alan [Morrissey.Alan@epa.gov]; Denton, Loren [Denton.Loren@epa.gov]; Vinch, James [Vinch.James@epa.gov]; Witt, Richard [Witt.Richard@epa.gov]; Levine, MaryEllen [levine.maryellen@epa.gov]; Billah, Mohammed [Billah.Mohammed@epa.gov]; Bosma, Connie [Bosma.Connie@epa.gov]
CC: Theis, Joseph [Theis.Joseph@epa.gov]; Nagle, Deborah [Nagle.Deborah@epa.gov]
Subject: Follow up on Iowa League of Cities discussion
Attachments: Permits Scenaros v8.docx
Location: DCRoomEast7203/DC-ICC-OWM
Start: 8/29/2013 5:15:00 PM
End: 8/29/2013 6:15:00 PM
Show Time As: Tentative

Follow up to last week discussion – I've included a discussion of options for interpreting the decision. The draft options paper does not discuss the issue of non-acquiescence.



Permits Scenaros
v8.docx

Appointment

From: Bosma, Connie [Bosma.Connie@epa.gov]
Sent: 8/27/2013 10:12:48 PM
To: Nagle, Deborah [Nagle.Deborah@epa.gov]

Subject: FW: Follow up on Iowa League of Cities discussion
Attachments: Permits Scenarios v8.docx
Location: DCRoomEast7203/DC-ICC-OWM

Start: 8/29/2013 5:00:00 PM
End: 8/29/2013 6:00:00 PM
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-----Original Appointment-----

From: Weiss, Kevin
Sent: Tuesday, August 27, 2013 10:01 AM
To: Weiss, Kevin; Morrissey, Alan; Denton, Loren; Vinch, James; Witt, Richard; Levine, MaryEllen; Billah, Mohammed; Bosma, Connie
Subject: Follow up on Iowa League of Cities discussion
When: Thursday, August 29, 2013 1:00 PM-2:00 PM (GMT-05:00) Eastern Time (US & Canada).
Where: DCRoomEast7203/DC-ICC-OWM

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Permits Scenarios
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Message

From: Weiss, Kevin [Weiss.Kevin@epa.gov]
Sent: 9/26/2013 6:14:35 PM
To: Weiss, Kevin [Weiss.Kevin@epa.gov]; Penman, Crystal [Penman.Crystal@epa.gov]
CC: Bosma, Connie [Bosma.Connie@epa.gov]; Sykes, Connie [Sykes.Connie@epa.gov]; Nagle, Deborah [Nagle.Deborah@epa.gov]; Frace, Sheila [Frace.Sheila@epa.gov]; Sawyers, Andrew [Sawyers.Andrew@epa.gov]
Subject: Revised Materials for Friday Prebrief
Attachments: Decision 711_F_3d_844.rtf; Iowa League of Cities Briefing 9-26-13 v4.docx

Crystal:

My apologies – we made some changes to the 5 page briefing paper for the prebrief on the Iowa Cities case at 1:30-2:00 tomorrow. Please replace the version I sent this newer version. (The other attachment is a court case that is the same as what I sent earlier).

Thanks

Kevin

From: Weiss, Kevin
Sent: Thursday, September 26, 2013 11:52 AM
To: Penman, Crystal
Cc: Bosma, Connie; Sykes, Connie
Subject: Materials for Friday Prebrief

Crystal:

Here are the materials for the Prebrief on the Iowa Cities case at 1:30-2:00.

Please let me know if you have any questions.

Thanks

Kevin

How Should EPA interpret the *Iowa League* decision?

Issue: How to interpret the court's decision with respect to EPA's authority to regulate "blending"?

Timing: Briefings for the AAs for Water and Enforcement will held in the next few days. OMB is very interested in the Agency's position, there is a high degree of interest by stakeholders and HQ is receiving requests from the Regions for guidance.

I. Background and context

a. *Iowa League v. EPA*, 711 F.3d 844 (8th Cir. 2013), rehearing denied (July, 2013). The Eighth Circuit concluded that it had jurisdiction to review two EPA letters sent in response to inquiries from a Senator regarding certain requirements under the Clean Water Act (CWA). The court determined that the letters promulgated two new rules regarding mixing zones and "blending." The court vacated the rules because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act (APA). In addition, the court determined that, even if EPA had followed APA procedures, EPA lacked statutory authority to promulgate the new "blending rule."

b. Bypass regulation. 40 C.F.R. § 122.41(m) -- a required provision of all NPDES permit -- prohibits bypass defined as "the intentional diversion of waste streams from any portion of a treatment facility" unless certain conditions are met, including that there are "no feasible alternatives" to the bypass.. EPA's letter explained when diversions from any portion of the treatment system at a POTW would constitute a bypass and thus be prohibited under the bypass regulation and subject to having to make a "no feasible alternatives demonstration. Here is the specific language from the letter that the court reviewed:

"Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?"

Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible

alternatives" demonstration in the "bypass" provision at 40 CFR 122.4 1(m)(4). In certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units."

Ex. 5 Attorney Client (AC)

Ex. 5 Attorney Client (AC)

ATTACHMENT

How the Iowa League court described the effluent guideline program and secondary treatment regulations.

If a state chooses to operate its own permit program, it first must obtain EPA permission and then ensure that it issues discharge permits in accord with the same federal rules that govern permits issued by the EPA. § 1342(a); 40 C.F.R. § 122.41.

The EPA has interpreted this regime as "preclud[ing] [it] from imposing any particular technology on a discharger." *In re Borden, Inc.*, Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m), No. 78 (Feb. 19, 1980), at *2; *see also* NPDES Permit Writers' Manual 5-14, 5-15 ("Therefore, each facility has the discretion to select any technology design and process changes necessary to meet the performance-based discharge limitations and standards specified by the effluent guidelines."). The technology-based effluent limitations applicable to publicly-owned treatment works ("POTWs"), such as municipal sewer authorities, are based on a special set of rules known as the "secondary treatment" regulations. § 1311(b)(1)(B); 40 C.F.R. § 125.3(a)(1); *see generally* 40 C.F.R. § 133.102 (describing average monthly and weekly "minimum level[s] of effluent quality attainable by secondary treatment"). The secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality. *See* 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983). When technology-based effluent limitations would fall short of achieving desired water quality levels, the EPA is authorized to devise additional, more stringent water quality-based effluent limitations for those particular point sources. 33 U.S.C. § 1312(a). (footnotes omitted) *Id.* at pp. 855-56.

How the Iowa League court described the letter

During the spring of 2011, the League asked the EPA whether it could use "physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule]." The June 2011 letter responded by summarizing the EPA's 2005 proposed policy without specifically addressing how the application of that policy would impact the use of ACTIFLO or similar processes. The League sought additional clarification on whether this response meant that ACTIFLO could be used only if there were no feasible alternatives, which the September 2011 letter answered in the affirmative. According to the EPA, ACTIFLO units fail to "provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." Because ACTIFLO by itself is not considered a satisfactory secondary treatment unit, the EPA views the practice of intentionally routing flows away from a facility's traditional biological secondary treatment units and through ACTIFLO as a bypass that would only be allowed upon a showing of no feasible alternatives.

The League argues that by prohibiting the use of ACTIFLO internally, as one element of a facility's secondary treatment procedures, the EPA is effectively dictating treatment design, despite the agency's acknowledgment that the bypass rule and secondary treatment regulations do not allow for such determinations at the federal level. The League also claims that the EPA is effectively applying secondary treatment effluent limitations within a treatment facility; that is, it

is applying effluent limitations to the individual streams exiting peak flow treatment units, instead of at the end of the pipe. The EPA responds that using ACTIFLO to process peak wet weather flows diverts water from biological secondary treatment units, and therefore subjecting its use to a no-feasible-alternatives analysis comports with the plain language of the bypass rule. *Id.* at 859-60.

The court's discussion of blending

The EPA contends that the letters simply reflect an interpretation of the bypass rule, which it has been considering since 2005. *See 70 Fed. Reg. at 76,015* (describing the 2005 policy as "the Agency's interpretation" of the bypass rule). To be sure, a legislative rule is not created simply because an agency "supplies crisper and more detailed lines than the authority being interpreted." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112, 302 U.S. App. D.C. 38 (D.C. Cir. 1993). Nevertheless, the EPA's new blending rule is a legislative rule because it is irreconcilable with both the secondary treatment rule and the bypass rule. Municipalities chose to use ACTIFLO and analogous blending methods as an exercise of their discretion under the bypass rule, *see 53 Fed. Reg. at 40,609*, and secondary treatment rule, *see 48 Fed. Reg. at 52,259*, to select the particular technologies they deemed best suited to achieving the applicable secondary treatment requirements. However, the September 2011 letter severely restricts the use of "ACTIFLO systems that do not include a biological component" because the EPA does not "consider[] [them to be] secondary treatment units." The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. *40 C.F.R. § 122.45(h)*. There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See 40 C.F.R. § 133.100-102*. But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units "do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." If streams move around traditional biological secondary treatment processes and through a non-biological unit that "is itself a secondary treatment unit," then the system would not need to meet the restrictive no-feasible-alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged.

The court's holding on the blending rule

However, the blending rule clearly exceeds the EPA's statutory authority and little would be gained by postponing a decision on the merits. As discussed above, the September 2011 letter applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe. The CWA permits the EPA to set "effluent limitations based upon secondary treatment." 33 U.S.C. § 1311(b)(1)(B). But effluent limitations are restricted to regulations governing "discharges from point sources into navigable waters." 33 U.S.C. § 1362(11). The EPA is authorized to administer more stringent "water quality related effluent limitations," but the CWA is clear that the object of these limitations is still the "discharges of pollutants from a point source." 33 U.S.C. § 1312(a). In turn, "discharge of pollutant" refers to the "addition of any pollutant to navigable waters." § 1362(11). The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so. *See also Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 996, 325 U.S. App. D.C. 76 (D.C. Cir. 1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a 'point source'; it is not authorized to regulate the pollutant levels in a facility's internal waste stream."). Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority.

V. Conclusion

For the foregoing reasons, we deny the EPA's motion to dismiss and grant the League's petition for review. We vacate both the mixing zone rule in the June 2011 letter and the blending rule in the September 2011 letter as procedurally invalid. Further, we vacate the blending rule as in excess of statutory authority insofar as it would impose the effluent limitations of the secondary treatment regulations internally, rather than at the point of discharge into navigable waters. We remand to the EPA for further consideration. [footnote omitted]. *Id.* at 877-78.

Message

From: Weiss, Kevin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=793BC48D7A6743DCABFF30DE8C2175DD-KEWEISS]
Sent: 8/28/2013 7:46:31 PM
To: Vinch, James [Vinch.James@epa.gov]
CC: Denton, Loren [Denton.Loren@epa.gov]; Witt, Richard [Witt.Richard@epa.gov]; Denton, Loren [Denton.Loren@epa.gov]
Subject: RE: Follow up on Iowa League of Cities discussion

Jim:

Ex. 5 Deliberative Process (DP)

Kevin

From: Vinch, James
Sent: Wednesday, August 28, 2013 3:32 PM
To: Weiss, Kevin
Cc: Denton, Loren
Subject: RE: Follow up on Iowa League of Cities discussion

Kevin,

Since I will not be able to attend the meeting tomorrow, I thought I would send you my comments on the options paper that you prepared. **Ex. 5 AC/DP**

Ex. 5 AC/DP

Jim Vinch
Attorney
Water Enforcement Division
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460
tel: (202) 564-1256
fax: (202) 564-0024

-----Original Appointment-----

From: Weiss, Kevin

Sent: Tuesday, August 27, 2013 10:01 AM

To: Morrissey, Alan; Denton, Loren; Vinch, James; Witt, Richard; Levine, MaryEllen; Billah, Mohammed; Bosma, Connie

Subject: Follow up on Iowa League of Cities discussion

When: Thursday, August 29, 2013 1:00 PM-2:00 PM (GMT-05:00) Eastern Time (US & Canada).

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Sent: 8/29/2013 1:07:28 PM
To: Morrissey, Alan [Morrissey.Alan@epa.gov]; Denton, Loren [Denton.Loren@epa.gov]; Vinch, James [Vinch.James@epa.gov]; Witt, Richard [Witt.Richard@epa.gov]; Levine, MaryEllen [levine.maryellen@epa.gov]; Billah, Mohammed [Billah.Mohammed@epa.gov]; Bosma, Connie [Bosma.Connie@epa.gov]
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Note: The GMT offset above does not reflect daylight saving time adjustments.

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Jim Vinch
Attorney
Water Enforcement Division
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460
tel: (202) 564-1256
fax: (202) 564-0024

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